FILE COPY

JAN 27 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1011

MARIETTA NORTON, et al.,
Petitioners,

v.

THE DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY, et al.,
Respondents.

BRIEF
In Opposition to the Petition for the Writ of Certiorari

DAVID M. PACK
Attorney General
State of Tennessee

THOMAS E. FOX
Deputy Attorney General
State of Tennessee

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

Page

Suggestion of diminution 2

Jurisdiction 3

Counterstatement of questions presented 4

Counterstatement of the case 5

Argument 10

Conclusion 20

Cases Cited

Adderley v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 11

Barker v. Hardway, 399 F. 2d 638 (4th Cir. 1968) .. 18

Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 11

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), cert. den. 368 U. S. 930 16

Esteban v. Mo. State College, 290 F. Supp. 622 15

Feiner v. New York, 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295 10

Goldberg v. Regents of the University of California, 248 A. C. A. 1015, 57 Cal. Rep. 463 .....11, 13, 18

Jones v. State Board of Ed. of and for the State of Tenn., 279 F. Supp. 190 15

McCulloch v. Maryland, Vol. 17, U. S. Sup. Ct. 318, 4 Wheat. 2d 314, 4 L. Ed. 578 19

Pickering v. Board of Ed. of TP. H. S. Dist. 205, Illinois, 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 .....11-12, 14

Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 ..... 10, 12
Soglin v. Kauffman, 295 F. Supp. 978 18
Sweezy v. New Hampshire, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 13
Taylor v. McElroy, 360 U. S. 709, 79 S. Ct. 1428, 3 L. Ed. 2d 1528 3
Tinker v. Des Moines Independent School District, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1011

MARIETTA NORTON, et al.,
Petitioners,

v.

THE DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY, et al.,
Respondents.

BRIEF

In Opposition to the Petition for the Writ of Certiorari

MAY IT PLEASE THE COURT:

The petitioners seek a review by this Court of a judgment and opinion rendered by the United States Circuit Court of Appeals, Sixth Circuit, sustaining a judgment of the United States District Court for the Middle District of Tennessee which upheld the decision of the President

and the Faculty Discipline Committee of East Tennessee State University to suspend indefinitely the petitioners' enrollment at that university. They, of course, insist that the decision of the United States Circuit Court of Appeals, Sixth Circuit, the decision of the United States District Court and of the East Tennessee State University officials should be reversed.

SUGGESTION OF DIMINUTION

The petitioners consist of eight (8) students at the university aforementioned. Since their enrollment was suspended, and after the hearing in the United States District Court, one (1) of the petitioners, Joseph Rene Garber, applied for re-admission, which was denied by the Faculty Discipline Committee, but on appeal to the President had his re-enrollment authorized and has now graduated with a Bachelor's degree. Four (4) other petitioners, George Elmer Ball, David Wayne Coker, Richard Lawrence Crawford and Michael V. Haga, applied to the Faculty Discipline Committee. Each was given a re-admission date, but not at the next registration for enrollment of students. Their decision was appealed to the President of the university and he moved the date for their enrollment to the next registration for that purpose. None of these four (4) registered as authorized. Another petitioner, Marietta Anderson Norton, was authorized to re-enroll at the university at the beginning of the Winter Quarter, January, 1969. She did not appeal to the President of the university nor did she enroll as authorized. Oscar Alphonzo Heffner, Jr., was denied readmission to the university and he made no appeal to the President. Robert Louis McCall made no application for readmission but did make inquiry regarding his reenrollment. He was informed that an opportunity would be scheduled to consider the matter at his convenience. He made no application. (This petitioner was dropped from the uni-

BLEED THROUGH POOR COPY

versity rolls for academic reasons as well as for disciplinary purposes.)

Thus, it clearly appears that six (6) of the petitioners have been given an opportunity to reenroll at East Tennessee State University. Only one (1) of that group reenrolled and he has since graduated. One (1) made no application for readmission as he was advised he could do, and one (1), after being denied the privilege of reenrolling by the Faculty Discipline Committee, made no appeal to the President of the university to overrule the decision of the Faculty Discipline Committee, which was available to him and by which six (6) of the others obtained a modification of the Faculty Discipline Committee's decision with respect to their enrollment, a circumstance this student, Heffner, knew or should have known.

This suggestion of diminution is made by authority of **Taylor v. McElroy**, 360 U. S. 709, 711, 79 S. Ct. 1428, 1429, 3 L. Ed. 2d 1528, 1530, where it was said with respect to an employee who had failed a security clearance by the Defense Department after the security regulations had been changed so as not to affect them adversely:

> "In view of the fact that petitioner has received clearance, the ultimate relief which he demanded, and in view of the representations of the Solicitor General to the effect that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged, this case is moot."

JURISDICTION

Counsel for the respondents admit the jurisdiction of the Court under the authority cited by counsel for the petitioners.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Counsel for the petitioners have made a long detailed statement of the questions presented. Counsel for the respondents insist that the questions presented by the record are simply:

1. Whether or not the conduct of the petitioners in distributing the leaflets hereinafter discussed was protected by the First Amendment right to freedom of speech?

2. Whether or not the proceeding to determine this question was contrary to the due process clause of the Fourteenth Amendment, Constitution of the United States?

COUNTERSTATEMENT OF THE CASE

The eight petitioners were students at East Tennessee State University. One was a graduate student. They were suspended indefinitely from enrollment at that institution near the end of the school year, early June, 1968, for distributing leaflets on the campus which were critical of the school administration upon the theory that the leaflets were false, seditious and of an inflammatory nature to the extent that they were disruptive of the educative processes at the university. These leaflets are found on pages 11A-17A of the petition and are designated as the "First Piece" and "Second Piece." Petitioner Garber participated in the distribution of the first piece, only. Petitioners Norton, McCall and Crawford participated in the distribution of the second piece, only. Petitioners Coker, Ball, Haga and Heffner had a part in the distribution of both pieces.

All of the petitioners except Heffner and Coker were given notice May 31 (Friday), 1968, to appear before the Faculty Discipline Committee on June 3 (Monday), 1968, at a designated place to answer the charge that they had distributed on the university campus materials which were false, seditious and of an inflammatory nature. The petitioner Heffner was given the same notice May 29, 1968, to appear before the Faculty Discipline Committee on May 30, 1968. Petitioner Coker was not given written notice but notified orally June 4, 1968, to appear the following day before the Faculty Discipline Committee on the same charge. In the oral notice, Coker was informed that the reason for his being required to appear before the Faculty Discipline Committee was his participation in the distribution of the material in question. Each of the petitioners directed to appear on June 3, 1968, was permitted to select the hour for the hearing.

None asked for counsel and none asked for a continuance at that time. Petitioner Heffner appeared for his hearing with counsel. Each petitioner, other than Heffner, did request a continuance when they appeared for the hearing so that they could obtain counsel. Each of the petitioners admitted to the committee they distributed the literature, as stipulated above, and each petitioner was given an opportunity to convince the Faculty Discipline Committee that the literature was not of a false, seditious or inflammatory nature.

Subsequent to the hearing, each of the petitioners was notified that they were found to have distributed material of a false, seditious and inflammatory nature, that they were each suspended indefinitely from attendance at East Tennessee State University as of the end of the Spring Quarter 1968, that their records at the university were encumbered, that each had a right to appeal to the President of the university from the decision of the Faculty Discipline Committee, and that their readmission in the future to the university would be at the discretion of the Faculty Discipline Committee.

The petitioners did appeal the ruling of the Faculty Discipline Committee to the President of the university. The hearings before the President were held June 10, 1968, from about 9:00 a. m. until 7:00 or 7:30 p. m. (the President of the university, Dr. Culp, testified that according to his memory the hearings in his office were held June 10, 1968). This was not questioned or verified. Each petitioner was informed by the President that he could have counsel present for the hearing if the student desired, but he informed them that he would not propose to have a proceeding as would be held in a court of law because he wanted the student to talk freely and easily and to say "whatever and everything that he had to say in his behalf." The students did talk freely to Dr. Culp and their attitude was very acceptable to him.

BLEED THROUGH POOR COPY

Seven days after the hearing in the President's office, June 17, 1968, each of the petitioners received a letter from Dr. Culp informing them that he was upholding the decision of the Faculty Discipline Committee. The body of the letter is as follows:

> "After careful review of your appeal, I am sustaining the decision of the Discipline Committee. Punishment of a student is a most unpleasant matter, amounting to a great burden for a teacher or university official. I certainly regret the necessity for imposing punishment on any student.
>
> "We shall look forward to the time when you are able to convince the Discipline Committee that you are ready to return to the University as a student eager to learn and conform to the institution's expectations for acceptable conduct."

The suit in this cause was filed June 18, 1968. A hearing was held on the 26th of June, 1968. The Court rendered on oral opinion from the bench at the conclusion of the hearing. Later the District Judge made a finding of fact and a conclusion of law consistent with the opinion rendered from the bench. The Court held, among other things: (1) the notice was adequate to forewarn the petitioners of the nature of the charges against them; (2) the notice was timely given; (3) the hearing was conducted before a Discipline Committee composed of the nine (9) Deans at East Tennessee State University; (4) students were given an opportunity to speak freely before the committee during their hearing; (5) the issues before the committee in each hearing were whether or not the students distributed the literature and whether or not the literature was false, seditious and inflammatory on its face; (6) there was no necessity for calling witnesses because each petitioner admitted their part in the distribution of the literature and the board considered the literature on its face; (7) the committee found that the

documents distributed by the students were on their face of a potentially disruptive character and were inflammatory in nature and that they were calculated to be damaging to the institution and to the good order and discipline of the campus; (8) the President of the university carefully reviewed each student's case after advising them of their right to counsel and urging that they talk freely; (9) the President found the documents would very probably have a disruptive effect "and that they were false and inflammatory in character such as were calculated on their face to be damaging to the institution and to good order and discipline on the campus;" (10) failure on the part of the student to have a lawyer present to represent them under the facts in this case was not prejudicial and would not infringe petitioner's constitutional rights; (11) the Discipline Committee properly found the documents to be abrasive, abrupt and rude in character and calculated to arouse resentment on the part of the administration and on the part of students at the university; and (12) the documents did not come within the area of protected First Amendment activities when considered in the context of the case.

The Court then concluded, among other things, that (1) the petitioners were afforded a fair and adequate hearing and that the Court should not substitute its judgment on matters so determined for the judgment of the proper authorities; (2) in matters of this type each case must be decided upon its own merits and tested by the principle of fundamental fairness considering that students are not citizens at large in the community and the character of the university, its function and purpose and the purpose of the students in being there and it was proper for the committee to consider the literature on its face along with statements by the distributors and authors thereof; and (3) suspension is different from expulsion in that it involves the right of the Discipline

Committee to re-evaluate the matter on its own motion or upon the application of the student.

The decision of the United States District Court was appealed to the United States Circuit Court of Appeals, Sixth Circuit. The United States Circuit Court of Appeals, Sixth Circuit, as stated before, upheld the decision of the United States District Court on both questions that the leaflets were false and inflammatory and of a disruptive nature, and that the petitioners had not been denied due process of law.

ARGUMENT

I

Both the majority opinion and the dissenting opinion by the United States Circuit Court of Appeals, Sixth Circuit, in this cause recognize that if the distribution of the leaflets by the petitioners in this cause would tend to create a substantial and material interference with the educative processes of the university, the university authorities were justified in taking necessary steps to prevent the activity. This is the same principle recognized by this Court several years ago in **Schenck v. United States**, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470, 473-474, when it was said:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

This same principle has been upheld in other cases. In **Feiner v. New York**, 340 U. S. 315, 71 S. Ct. 303, 95

BLEED THROUGH POOR COPY

L. Ed. 295, it was held that the right of free speech did not sanction incitement to riot nor prevent the State from the exercise of its police power when clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order is threatened. More recently, the same principle was reiterated in **Cox v. Louisiana**, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471, and still more recently in **Adderley v. Florida**, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149, it was held that the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

The difficulty in the college campus cases, as indicated by the majority and dissenting opinions in this cause by the United States Circuit Court of Appeals, Sixth Circuit, is that of agreeing upon or identifying activity which defeats the purpose for which universities exist. No rational persons insist that the State does not have a responsibility and duty, as well as authority, to maintain institutions of higher learning for the purpose of educating its citizens, imparting learning and the advancement of the boundaries of knowledge and that to fulfill this function it must maintain order on its campus and exclude therefrom those who are detrimental to that purpose. **Goldberg v. Regents of the University of California**, 248 A. C. A. 1015, 57 Cal. Rep. 463.

To solve the problem it is necessary to understand what is meant by what educators designate as a learning situation. This term may not have been definitely defined and may be one that is not susceptible to such a definition. Generally speaking, it is said that the circumstances must be such that there will be a free flow of ideas between the instructor and the student, without fear or intolerance, and free from suspicion, distrust and tension. This Court in **Pickering v. Board of Ed. of TP**

H. S. Dist. 205, Illinois, 391 U. S. 563, 569-570, 88 S. Ct. 1731, 1735, 20 L. Ed. 2d 811, 818, recognized that the type of relationship between people who have to work together depends upon the circumstances and that in some instances mutual understanding and confidence are essential as indicated by the following excerpt:

> "The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

To preserve or maintain a learning situation, school authorities cannot on many occasions wait until a riot or rebellion by the students is underway to take corrective measures because a learning situation must surely have been greatly impaired long before the relationship between teacher and student has deteriorated to the point of rioting. This principle was recognized in **Tinker v. Des Moines Independent School District**, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, when it was held, in effect, that school authorities are justified in taking corrective measures when circumstances exist which lead them to forecast substantial disruption of or material interference with school activities. Likewise, in **Schenck v. United States**, *supra*, the clear and present danger doctrine was not limited to the burning of a building but it was extended to circumstances that were of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress

has a right to prevent. Stated conversely, activity which substantially or materially disrupts a governmental function or responsibility cannot be protected under the guise of free speech.

In recognition of the difference between the application of the freedom of speech provisions on university campuses from that of the public generally, the Supreme Court of California in **Goldberg v. Regents of the University of California,** *supra,* at 472, said:

> "Historically, the academic community has been unique in having its own standards, rewards and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom. Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself."

A similar principle was also mentioned in **Sweezy v. New Hampshire,** 354 U. S. 234, 250, 77 S. Ct. 1203, 1211-1212, 1 L. Ed. 2d 1311, 1324-1325, as follows:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should under-estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new

discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The first sheet distributed by the petitioners Garber, Coker, Ball, Haga and Heffner, after reciting a number of grievances which they, except for Garber, admitted to be false at least in part, asked how the students at the university had reacted. This was followed by additional questions calculated to stir them to act as French, Polish and Czech students had acted, and also the students at other American universities. Clearly, such literature could not be permitted to circulate on any university campus without breaching the trust and confidence necessary between students and school authorities essential for a learning situation to exist. Such leaflets would be bound to cause tension, suspicion and distrust between students and the school authorities. The school authorities and the Federal District Judge were of the opinion that this type of leaflet on its face was a call to the students at the university to take over a building and commit other disruptive acts as was done at Columbia University and other universities throughout the country. This is different from the circumstances in **Pickering v. Board of Ed. of TP H. S. Dist. 205, Illinois,** *supra.* In that case, it was pointed out that the type of relationship required by the teacher and student did not exist between the teacher and the school board, particularly on a matter that was to be deterimned by referendum of the people generally.

In the dissenting opinion in this cause, by way of footnote (United States Circuit Court of Appeals, Sixth

BLEED THROUGH POOR COPY

Circuit, page 27), it is stated that campus officials must have the authority to handle the day-to-day disciplinary problems and prevent any interference with the normal activities of the institution. To maintain this type of capability, the administration and faculty, of course, must have power as well as authority. No instructor can maintain discipline in the classroom without a base of power as well as authority. Leaflets of the type described are bound to greatly depreciate the power of any school authorities. If they cannot prevent leaflets critical of the administration, as these were, containing false statements, as admitted by the petitioners, that are designed to be inflammatory, then it is suggested that they would not have power to command respect at any place on the campus. This type of conduct is not too different from "hanging the dean in effigy" denounced with other conduct in **Esteban v. Mo. State College**, 290 F. Supp. 622.

The second sheet, distributed only by Norton, McCall and Crawford, may not be nearly as abrasive as the first, except the second sheet shows on its face that it was composed and distributed for the purpose of giving moral support to those petitioners who distributed the first sheet. For this reason, counsel for respondents insist that all the petitioners must be in the same category since one group rendered aid and assistance to the other.

II

A statement of due process set out by the Federal District Judge in **Jones v. State Board of Ed. of and for the State of Tenn.**, 279 F. Supp. 190, 197, furnishes adequate guidelines for determining whether or not the students in this case were denied due process. The statement is as follows:

> "The right to due process of law, guaranteed by the Fourteenth Amendment, requires, among other

things, that the accused be granted adequate and timely notice of the charges against him, Frisbie v. Collins, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), a hearing, Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), before a fair and impartial tribunal, In re Murchison, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955), and an opportunity to produce evidence in his own behalf, Baltimore & O. R. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936)."

The application of the foregoing rules in this type of case was found amplified in **Dixon v. Alabama State Board of Education,** 294 F. 2d 150 (5th Cir. 1961), **cert. den.** 368 U. S. 930. In that case at pages 158-159, the following standards were set forth with respect to timeliness and sufficiency of the notice:

"The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attend-

BLEED THROUGH POOR COPY

ing publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

The procedure followed with the petitioners by the Faculty Discipline Committee and the President meets the foregoing standards.

It is complained that they were not given an opportunity to have a lawyer present before the Faculty Discipline Committee, and it is also complained that they were not given an opportunity to present witnesses. If there were any justification for this argument, such was not the situation when they were given a hearing before the President of the university. He informed each of the petitioners that the hearing would not be a formal adversary type hearing but they would be permitted to have counsel at the hearing and to call witnesses if they desired, but none desired to have counsel or to call witnesses. (Heffner had counsel before the Faculty Discipline Committee.)

In the hearing conducted by the Federal District Court, the petitioners, of course, did have counsel, were permitted to testify and to call witnesses. The State, therefore, insists that at least by the time the hearing was completed in the Federal District Court, there was no denial of due process of law. **Barker v. Hardway**, 399 F. 2d 638 (4th Cir. 1968).

In the hearing it is insisted that the Federal District Judge did not exercise his own judgment with respect to the effect of the leaflets but that he merely reviewed the judgment of the university authorities. This is refuted by the finding of fact and conclusions of law by the Federal District Judge in the following excerpt from page 48A:

> "That the Discipline Committee could properly have found that these documents were abrasive, abrupt and rude in character and that they were calculated to arouse resentment both on the part of the administration and on the part of the students of East Tennessee State University.
>
> "That at least one document is susceptible of the interpretation that the writer of the article is encouraging demonstrations similar to those which had occurred on other campuses throughout the country; and the article can be reasonably and logically construed to mean that the writer of the article was calling upon the students of East Tennessee State University to engage in the same kind of conduct and activity which had occurred at Columbia University and elsewhere."

The petitioners insist that since their conduct was not prohibited by an adequately worded university regulation they were denied due process. The case of **Soglin v. Kauffman**, 295 F. Supp. 978, is cited in support of this position. In **Goldberg v. Regents of the University of**

BLEED THROUGH POOR COPY

California, *supra*, it was said that the action taken by the university was a proper exercise of the university's disciplinary procedure and a proper exercise of its inherent general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well-being. Of course, implied or inherent authority is as old as the law and no code could ever be sufficiently complete that such authority or power would be rendered unnecessary. This Court in an early case, **McCulloch v. Maryland**, Vol. 17, U. S. Sup. Ct. 318, 4 Wheat. 2d 314, 4 L. Ed. 578, reiterated the doctrine. It has been stated with respect to the courts of this land that the inherent power of the judiciary means that which is essential to existence, dignity and functions of court from the very fact that it is a court. 21A Words and Phrases 17. It is submitted that inherent power is just as essential and necessary to the existence, dignity and functioning of the universities and other governmental agencies duly and legally constituted by the laws of this Nation and of the particular state wherein they are situated.

Counsel for the respondents challenge the premise that universities have now reached the stage in their development that such a code is necessary. Professor Charles Allen Wright, in an Oliver Wendell Holmes lecture at the University of Vanderbilt School of Law in April, 1969, entitled "The Constitution on the Campus" (reported, Vanderbilt Law Review, Vol. 22, pages 1027-1088), discussed this particular question and cited the fact that out of 30,000 students at the University of Texas between September, 1968, and March, 1969, there were 544 cases in which disciplinary charges were brought. From that number of cases, 531 were minor offenses and only 13 were major offenses. The students involved in eight of those offenses waived hearings, leaving only five, or less than one per cent, to be heard by the university disciplinary tribunal. These statistics, it would

appear, refute the idea that a code similar to a city charter with volumes of ordinances enacted pursuant to the charter are needed for the government of university campuses and they would indeed require a great deal of all university effort to administer.

CONCLUSION

Finally, it is insisted that an ideal learning situation where there is a free interplay of ideas between teacher and pupil or professor and student, free from suspicion and distrust and permeated with an attitude of cooperation, mutual respect and appreciation, can only be achieved by a skillful administrator and classroom teacher, under favorable circumstances, and that it is one of such delicacy leaflets falsely and abrasively criticizing those responsible for creating such a situation have a destructive and distractive effect.

Respectfully submitted

DAVID M. PACK
Attorney General
State of Tennessee

THOMAS E. FOX
Deputy Attorney General
State of Tennessee

Certificate of Service

I, Thomas E. Fox, Deputy Attorney General, State of Tennessee, one of the attorneys for the respondents and a member of the bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1970, I served copies of the within brief in opposition to the petition for writ of certiorari on the petitioners by

BLEED THROUGH POOR COPY

mailing said copies in duly addressed envelopes, postage duly paid, to counsel of record, namely, Honorable Charles Morgan, Jr., and Honorable Reber F. Boult, Jr., Five Forsyth Street, N. W., Atlanta, Georgia 30303, and Honorable Karen D. Ennis, 615 Stahlman Building, Nashville, Tennessee 37201.

Thomas E. Fox
Deputy Attorney General
State of Tennessee